Supreme Court, U.S.
FILED
MAY 2 1949
CHARLES ELMORE CROPLEY
CLERK

No. 759

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

SAMUEL ROTH, doing business as Psychic Research Press, Arrowhead Books, Hogarth House, Candide Press and The Monthly Book-Gem,

Appellant,

v.

ALBERT GOLDMAN, individually and as Postmaster at New York City,

Defendant-Appellee.

IN THE MATTER OF

The action of SAMUEL ROTH against ALBERT GOLDMAN, Postmaster at New York City, New York, for an injunction against the execution of orders of the Postmaster General excluding certain books, and printed matter concerning them, from the mails.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL ROTH,
Petitioner in Person.

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To the Honorables Fred M. Vinson, Chief Justice of the United States, and the Associated Justices of the Supreme Court of the United States:

Appellant, Samuel Roth, respectfully submits his petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case.

The urgency of the need for a review by this Court of the above matter, as public policy, is attested to by Judge Jerome Frank who, in his separate opinion (which comes as close to a dissenting opinion as a concurring opinion can get) hopes that "the Supreme Court will review our decision, thus dissipating the fogs which surround this subject" (R. 717).

The Questions Before the Court

1. Has the Postmaster General the power to prohibit the sale of a book through the mails, without giving the seller a hearing constituting *due process of law?*

2. Do 39 U. S. C. 255, 259 and 732 give the Postmaster General the right to decide that the description of a book as sexually interesting and provocative is necessarily the promise of an obscene book, and therefore barrable from the mails as a fraud perpetrated on the public, if the book sold is not in the opinion of the Postmaster General an obscene book?

3. Is the book entitled *Waggish Tales of the Czechs* obscene, lewd and lascivious within the meanings of the words as defined under the rulings of this Court?

Statement of the Case

Early in July, 1948, plaintiff appellant commenced an action in the District Court of the United States for the Southern District of New York against defendant-appellee, the Postmaster at New York, New York, and moved for an injunction *pendente lite* to restrain the defendant from

enforcing the provisions of four orders issued by the Postmaster General against the business of the plaintiff. Defendant made a cross-motion for summary judgment dismissing the complaint. Plaintiff's motion was denied, and defendant's cross-motion was granted. The plaintiff appealed from this order to the United States Court of Appeals of the Second Circuit, and the latter affirmed the decision of the District Court of the Southern District of New York.

The First Order

of the Postmaster General was issued against the appellant doing business as Psychic Research Press, selling through the mails a book entitled *Self-Defense for Women,* a pictorial essay on the art of self-defense, ju-jitsu or judo for women, originally purchased by him from Doubleday Publishing Company. The Post Office Department having once issued a Fraud Order against the sale of this book by appellant's company Avalon Press, Inc., contending that the selling-circular perpetrated a fraud on the purchaser by holding out the book as obscene when, in fact, it contained no objectionable matter, appellant eliminated from his new circular all matter originally objected to by the Post Office Department. Yet on April 6, 1948, the Postmaster General, without any notice or warning, issued a Supplemental Fraud Order barring the circular from the mails, ordering that all letters addressed to Psychic Research Press be returned with the word *Fraudulent* marked clearly on the envelope, and ordering all postmasters to refuse to cash money orders made out to Psychic Research Press.

Appellant respectfully submits that in the act of issuing this order:

1. The Postmaster General was wholly arbitrary and illegal, without warrent or authority in law, denying the plaintiff due process of law, in violation of the Fifth Amendment to the Constitution of the United States;

2. The Postmaster General was not justified by the facts;

3. The Postmaster General exceeded his authority under 39 U. S. C. 255, 259, and 732, according to which he "may upon evidence satisfactory to him that any person or company is engaged in conducting any * * * scheme or divice for obtaining money or property of any kind by means of false or fraudulent pretenses, representations or promises, instruct postmasters, etc." This act leaves much to the Postmaster General's discretion, but among matters discretionary to him Congress could not have meant to include his freedom to judge on what constitutes an obscene book or the promise of an obscene book, for nowhere in the act is he qualified for such judgment or instructed to obtain the assistance of persons qualified to correctly arrive at such a judgment;

4. The Postmaster General violated appellant's rights under the Fourth Amendment of the Constitution of the United States which guarantees "the rights of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure";

5. In refusing appellant's plea for an injunction against this Supplementary Fraud Order, the United States Dis-

trict Court of the Southern District of New York violated appellant's rights under the First, Fourth and Fifth Amendments to the Constitution of the United States;

6. In refusing appellant's plea for reversal of the affirmation of the United States District Court for the Southern District of New York, and, particularly, in neither affirming nor denying appellant's rights to *due process of law,* the United States Court of Appeals for the Second District violated appellant's rights under the First, Fourth and Fifth Amendments to the Constitution of the United States.

The Second Order

of the Postmaster General was issued against appellant doing business as Arrowhead Books, selling through the mails his own novel, *Bumarap.* Upon being summoned to Washington to show why a Fraud Order should not be issued against him because, as the Post Office Department claimed, appellant's circular represented the book as obscene, whereas, in fact, it was not obscene, appellant appeared before an Examiner of the Post Office Department and testified that this was so far from the truth that there were infinitely less complaints from purchasers of *Bumarap* than is usual in such mail-order transactions, that, indeed, three of the five pages of the circular matter were taken directly from the book in question, the remaining two pages comprising the usual sales-talk by which tradesmen sell their wares. Nevertheless, on April 15th, the Postmaster General issued a Fraud Order against Arrowhead Books, instructed postmasters to return all letters addressed to it marked *Fraudulent,* and refuse to cash money orders made out to it.

Appellant respectfully submits that in issuing the above Order:

1. The Postmaster General was not justified by the facts;

2. The Postmaster General exceeded his authority under 39 U. S. C. 255, 259 and 732, as heretofore set forth;

3. The Postmaster General violated appellant's rights under the First and Fourth Amendments to the Constitution of the United States;

4. In denying appellant's plea for an injunction against this Fraud Order the United States District Court for the Southern District of New York, and the United States Court of Appeals for the Second Circuit, violated appellant's rights under the First and Fourth Amendments to the Constitution of the United States.

The Third Order

of the Postmaster General was against appellant's business Hogarth House, a trade-name under which he published trade-books, among them the novel *Bumarap,* sold this time by means of a penny post-card against which the Post Office Department had made no objection.

Long before the Fraud Order was issued against Arrowhead Books, appellant, to conserve stationery, filled Hogarth House C. O. D. orders on forms bearing the Arrowhead Books imprint. These forms, which must be printed in sets of five, are quite expensive, so that, in war-time this constituted quite a saving. In x-ing out *Arrowhead Books* and typing *Hogarth House* over it, the typist blund-

ered so that on a large number of these sheets the x-ing out was so faint that postmasters made out money orders to Arrowhead Books which was easy to read instead of to Hogarth House the typing of which was too faint to be easily read.

When appellant brought this matter to the attention of the post office, and asked that the money orders be rewritten correctly, two post-office inspectors called on him and charged him with "trying to evade the provisions of the Fraud Order issued against Arrowhead Books." Carbon copies of the sheets, with the signatures of postal clerks showing that the sheets antedated the Fraud Order, were brought forth and shown to the inspectors. Wherever the book sold was *Bumarap* the original order was produced, showing that it had been sold through the post card in which the return address was Rise and Shine Books, 190 Market Street, Newark, N. J. In spite of that, a Supplementary Fraud Order was issued that very day from Washington, D. C. by the officials of the Post Office Department. Without asking appellant to bring the facts to light, the Postmaster General issued a Supplementary Fraud Order, specifying that all letters addressed to Hogarth House be returned to senders, marked *Fraudulent*, and that no money orders made out to Hogarth House be cashed.

Appellant respectfully submits that in the act of issuing the above order:

1. The Postmaster General was wholly arbitrary and illegal, without warrent or authority in law, denying the plaintiff due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and

abridging freedom of the press in violation of the First Amendment to the Constitution of the United States;

2. The Postmaster General was not justified by the facts;

3. The Postmaster General exceeded his authority under 39 U. S. C. 255, 259 and 732, as heretofore set forth;

4. The Postmaster General violated appellant's rights under the Fourth Amendment of the Constitution of the United States, which guarantees "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures;"

5. In refusing appellant's plea for an injunction against this Supplementary Fraud Order, the United States District Court for the Southern District of New York violated appellant's rights under the First, Fourth and Fifth Amendments to the Constitution of the United States;

6. In refusing appellant's plea for a reversal of the affirmation of the United States District Court for the Southern District of New York, and, particularly, in neither affirming nor denying appellant's rights to due process of law, violated under this procedure, the United States Court of Appeals for the Second Circuit violated appellant's rights under the First, Fourth and Fifth Amendments to the Constitution of the United States.

The Fourth Order

was issued by the Postmaster General against appellant's Candide Press which published and sold a joke-book entitled *Waggish Tales of the Czechs*, and against another of the

appellant's companies, a book-club trading as The Monthly Book-Gem, which listed *Wiggish Tales of the Czechs* for sale, together with eight other books.

A complaint was served upon the appellant by the Solicitor of the Post Office Department, pursuant to 39 U. S. Code, 255 and 18 U. S. Code 334 and 339, alleging that the book *Waggish Tales of the Czechs* is obscene, lewd and lascivious.

A hearing was held before an Examiner of the Solicitor's office of the Post Office Department in which the aforesaid charges were prosecuted by another member of the Solicitor's staff.

Appellant introduced evidence by a witness who has had over forty years of experience as writer, literary adviser to publishers that the book was not obscene, lewd or lascivious but was scholarly and of intrinsic literary merit.

The book consists of ninety-six episodes of a humorous character, chosen by the appellant, part editor and part author, to prove the universality of all humor, by relating contemporary smoking-room stories in Fourteenth Century Chaucerian English.

Appellant pointed this out to the Post Office Department during its hearing on the matter, and also that, the statutory words *obscene, lewd and lascivious* having been defined by the Courts as matter which, considered as a whole, has a tendency to excite the sensual desires of the average reader, they could not properly be applied to a book of jokes whose innate tendency, according to the most authoritative modern psychologists such as Hall and Freud, is to sublimate the feeling of desire into the more social expression of laughter.

Nevertheless, though he did not call a single witness competent to testify to the contrary of appellant's contentions, the Examiner for the Post Office Department found *Waggish Tales of the Czechs* to be obscene, lewd and lascivious, and on April 22, 1948 an order was issued by the Postmaster General instructing the defendant, the Postmaster at New York, New York, to return to senders all letters addressed to the appellant, with the word *Fictitious* stamped on the outside of each envelope, and that no money orders made out to Candide Press or The Monthly Book-Gem be cashed.

Appellant respectfully submits that in the act of issuing the above order

1. The Postmaster General was not justified by the facts;

2. The Postmaster General exceeded his authority under 39 U. S. C. 259, as heretofore set forth;

3. The Postmaster General violated appellant's rights under the First and Fourth Amendments to the Constitution of the United States;

4. The Postmaster General violated appellant's rights under the Fourth Amendment to the Constitution of the United States, as heretofore set forth;

5. In refusing appellant's plea for an injunction against the above order, the United States District Court of the Southern District of New York violated appellant's rights under the First, Fourth and Fifth Amendments to the Constitution of the United States;

6. In refusing appellant's plea for reversal of the affirmation of the United States District Court for the Southern District of New York, and, particularly, in neither affirming nor denying appellant's rights to *due process of law,* violated by the above order, the United States Court of Appeals for the Second Circuit violated appellant's rights under the First, Fourth and Fifth Amendments of the Constitution of the United States.

Appellant respectfully submits that the majority opinion of the United States Court of Appeals for the Second Circuit, of his book *Waggish Tales of the Czechs,* that they are "American-made or sharing smoking-room jests and stories, obscene or offensive enough by any refined standards" is a dangerous departure from the standard set by this Court in the case of *Hennegan* v. *Esquire, Inc.,* 66 Sup. Ct. 456, 327 U. S. 146, involving the withholding of second-class mailing privileges from the magazine Esquire, held as follows, in an opinion by Mr. Justice Douglas:

> "Under our system of government there is an accommodation for the widest varieties of tastes and ideas. 'The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's *Queen Mab* was an indictable offense, are a warning to all who have to determine the limits of the field within which authors may exercise themselves.' United States v. One Book Entitled Ulysses, 72 F. 2nd, 705, 708.) What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubt-

> less would be a contrariety of views concerning Cervantes' *Don Quixote,* Shakespeare's *Venus and Adonis,* or Zola's *Nana.* But a requirement that literature or art conform to some norm prescribed by an official smacks of ideology foreign to our system • • • From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values."

Appellant is not a lawyer, and he does not presume to urge his rights in this matter except by the arguments adduced in similar matters by lawyers and judges. Perhaps his own opinion of the worthiness of the book, Waggish Tales of the Czechs, has been colored by the years spent by him on its research, writing and editing (the name Norman Lockridge on the title-page is a well-known pseudonum of his), as well as by the thousands of dollars he has invested in publishing and advertising it. But he has been a writer for some thirty-five years, with books published here and translated abroad, a few of which have won the praise and esteem of some of the most eminent men of letters of his time, and even if he yielded to the literary tastes of the judges of the United States Court of Appeals, which he does not, he would still hold most mightily to the opinion of Mr. Justice Douglas, that what seems trivial to Judges Hand, Clarke and Frank is important to him, and that his property rights in it are worthy of maintenance by this Court.

Appellant respectfully urges upon this Court the importance of an examination of the Postmaster's acts described above, which proceed from his powers under 39 U. S. C. 255, 259 and 732, to determine whether he exceeds

them or not, especially since, as is pointed out by Judge Frank (R. 718) "Our decision will become a precedent—in a circuit which includes America's great publishing center—affecting the exercise of the right of free press guaranteed by the First Amendment." In *Simmons* v. *Farley*, 18 F. Supp. 758, at page 762, the United States District Court of the District of Columbia, held as follows: "The statutes in question are only intended to cover cases of actual fraud in fact, and mere matters of opinion on which witnesses might differ in their conclusions will not substantiate a fraud order." But how is the Postmaster General to distinguish "fraud in fact" from "fraud in opinion" if the only witnesses the Post Office Department brings forward and listens to are members of its own staff which for a generation* has treated all matters relating to sex as an unrelated evil? The Postmaster General has himself given the best possible summary of his attitude to testimony in such matters. "The effect on the average person of the plaintiff's advertisements," he argues with regard to the above matters on pages 7 and 8 of his brief before the United States Court of Appeals for the Second Circuit, "is a plain, ordinary fact. Just as a lay witness's testimony that a certain liquid seen by him was blood is considered factual rather than just a matter of opinion the Postmaster General's conclusion that the ordinary person would be deluded by the plaintiff's advertising is one

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* In this connection it is perhaps important to call to the attention of this Court the following significant fact: Although the Post Office Department's verdicts on books and mailings relating to sex have been reversed many times in the past few years by District Courts, Circuit Courts, and even the Supreme Court of the United States, it has not found it necessary to make any change in the official personnel which framed these verdicts.

well within his province as a matter of fact." But would not a proper court, hearing such testimony, inquire into circumstances? Would not the liquid be one thing if seen on the person of one prostrated, and pouring from an obvious wound, but quite another thing if seen on the shirt-front of one standing at a vendor's cart, happily chewing away at a hamburger? Appellant testified before the Postmaster General that whereas it is normal for a company to get back from dissatisfied purchasers about twelve percent of books sold through the mails, appellant's returns of the same nature during the past six years, on increasing business done with approximately the same list of buyers, and on the circulars complained of especially, came to less than three per cent. Is this blood the Postmaster General is complaining of, or is it ketchup? The mute, substantial testimony of these thousands of men and women from every village, town, city, and religious denomination in the United States is lost sight of by the Post Office Department in its mad war against all public discussion of sex.

Appellant respectfully submits that, far from being a question to be left to the jurisdiction of the individual states, it is, from the point of view of the public welfare, most fortunate that it relates to the Post Office Department, and so to be decided under federal jurisdiction. The life of a book begins and ends in the mails. In the words of the United States Court of Appeals for the Second Circuit, in its decision of May 28, 1948, in the case of the *Postmaster General* v. *Popenoe et al.*:

> "To deprive a publisher of the use of the mails is like preventing a seller of goods from using a principal highway which connects him with his market . . .

"Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office, the people have no definite rights reserved by the First and Fifth Amendments to the Constitution, and if they have, it would follow that in administering the laws established to protect the mails and the regulations thereunder the duty of the Postmaster General would be—to use the language of Justice Brandeis in the Burleson case (supra 255 U. S. 407, 41 S. Ct. 352, 65 L. Ed. 704)—that:

" 'In making the determination he must, like a court or jury, form a judgment whether certain conditions prescribed by Congress exist, or controverted facts or by applying the law. The function is a strictly judicial one, although exercised in administering an executive office. And it is not a function which either involves or permits the exercise of discretionary power.'

"It is obvious from this that to leave with the Post Office Department the last word in such matters is to give it the power of life or death over our national culture."

Wherefore, appellant respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Second Cir-

cuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the United States Court of Appeals for the Second Circuit had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States, and that the judgment herein of said United States Court of Appeals for the Second Circuit be reversed by this Honorable Court, and for such further relief as to this Court may seem proper.

Samuel Roth

SAMUEL ROTH,
Petitioner in Person.